

UNITED STATES MAGISTRATE COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA

AUDATEX NORTH AMERICA, INC., .
PLAINTIFF, . NO. 13-CV-1523
V. . JANUARY 29, 2015
MITCHELL INTERNATIONAL, INC., . 10:24 A.M.
DEFENDANT. . SAN DIEGO, CALIFORNIA
.

TRANSCRIPT OF MOTION HEARING
BEFORE THE HONORABLE BARBARA LYNN MAJOR
UNITED STATES MAGISTRATE JUDGE

APPEARANCES:

FOR THE PLAINTIFF: IRELL AND MANELLA
BY: DAVID C. MCPHIE, ESQ.
BY: PATRICK MCGILL, ESQ.
840 NEWPORT CENTER DR, STE. 400
NEWPORT BEACH, CALIFORNIA 92660

FOR THE DEFENDANT: MORGAN, LEWIS & BOCKIUS, LLP
BY: JASON C. WHITE, ESQ.
77 WEST WACKER DRIVE, SUITE 500
CHICAGO, ILLINOIS 60601

COURT REPORTER: DEBORAH M. O'CONNELL, RPR, CSR
333 W. BROADWAY, SUITE 420
SAN DIEGO, CALIFORNIA, 92101

PROCEEDINGS RECORDED BY ELECTRONIC SOUND RECORDINGS

1 SAN DIEGO, CALIFORNIA, JANUARY 29, 2015, 10:24 A.M.

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THE CLERK: FOR THE RECORD, ITEM NO. 2,
13-CV-1523-BEN-BLM, AUDALEX NORTH AMERICA, INC. VS. MITCHELL
INTERNATIONAL, INC., ON FOR MOTION HEARING.

7

PLEASE STATE YOUR APPEARANCES FOR THE RECORD.

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MR. MCPHIE: GOOD MORNING, YOUR HONOR. DAVID MCPHIE,
WITH AUDALEX.

10

THE COURT: THANK YOU.

11

MR. MCGILL: PATRICK MCGILL.

12

THE COURT: YOU'RE NOT ON MY CALENDAR.

13

14

MR. WHITE: GOOD MORNING, YOUR HONOR. JASON WHITE,
FOR MITCHELL.

15

THE COURT: AND YOU ALSO ARE NOT ON MY CALENDAR.

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19

20

OKAY. HAVE A SEAT, GENTLEMEN. I SET THIS FOR A HEARING,
RATHER THAN ISSUING A WRITTEN ORDER, BECAUSE I AM VERY
CONCERNED ABOUT THE LARGE NUMBER OF DISCOVERY DISPUTES THAT THE
PARTIES ARE HAVING AND THE FACT THAT YOU ARE HAVING THEM SO
CLOSE TO THE CLOSE OF DISCOVERY.

21

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25

WHEN I STARTED LOOKING AT ALL THE DISPUTES THAT THE
PARTIES HAVE, I DECIDED THAT THE FASTEST AND MOST EFFECTIVE AND
EFFICIENT WAY TO GET THE RULING TO YOU WAS TO HAVE EVERYBODY
COME IN AND ISSUE MY RULINGS ORALLY. I WILL BE ISSUING A
WRITTEN ORDER AFTER THIS HEARING, BUT IT'S GOING TO JUST STATE

1 WHETHER I GRANT IT OR DENY MOTIONS. THE REASONING I'M GOING TO
2 SET FORTH RIGHT NOW. I DO NOT NEED ORAL ARGUMENTS ON THE VAST
3 MAJORITY OF THESE MOTIONS. THEY WERE PRETTY STRAIGHTFORWARD.
4 THEY WERE WELL BRIEFED. BUT AS I SAID, I'M DOING THIS VERBALLY
5 BECAUSE IT'S THE FASTEST WAY TO GET THE RULINGS TO THE PARTIES,
6 AND YOU NEED TO GET FACT DISCOVERY COMPLETED AND MOVE INTO
7 EXPERT DISCOVERY.

8 FOR THE RECORD, I HAVE READ ALL OF THE PLEADINGS THAT THE
9 PARTIES SUBMITTED AND I'VE REVIEWED AND READ ALL OF THE
10 RELEVANT EXHIBITS, INCLUDING THE ONES THAT ARE UNDER SEAL.
11 OKAY, I'M NOT GOING TO RESTATE ALL OF THE ARGUMENTS. YOU GUYS
12 KNOW WHAT YOUR ARGUMENTS ARE. I'M GOING TO GET RIGHT INTO THE
13 LAW AND THE RULINGS.

14 SO THE FIRST MOTION IS MITCHELL'S MOTION TO DEPOSE
15 ATTORNEY BEN YORKS. THEY DO IT ON THE HOPES OF OBTAINING
16 EVIDENCE REGARDING THE DEFENSE OF INEQUITABLE CONDUCT.
17 INEQUITABLE CONDUCT IS THE DEFENSE, AS THE FED CIRCUIT IN
18 AMERICAN CAL CAR, INC. VS. AMERICAN HONDA MOTOR COMPANY, 651
19 F.3D 1318, AT 1334, STATED TO PROVE, QUOTE, TO PROVE
20 INEQUITABLE CONDUCT, THE ACCUSED INFRINGER MUST PROVIDE
21 EVIDENCE THAT THE APPLICANT, ONE, MISREPRESENTED OR OMITTED
22 MATERIAL INFORMATION; AND TWO, DID SO WITH A SPECIFIC INTENT TO
23 DECEIVE THE PATENT AND TRADEMARK OFFICE, CLOSED QUOTES.

24 GENERALLY, THE MATERIALITY THAT IS REQUIRED TO ESTABLISH
25 INEQUITABLE CONDUCT IS "BUT FOR," THAT IS, FOR EXAMPLE, WHETHER

1 PRIOR ART THAT AN APPLICANT FAILS TO DISCLOSE TO THE PATENT AND
2 TRADEMARK OFFICE IS A "BUT FOR" REASON THAT THE CLAIM WOULD
3 HAVE BEEN ALLOWED BUT FOR THE UNDISCLOSED PRIOR ART.

4 THE FED CIRCUIT IN 2000 -- OR IN THAT CASE, CITING A 2010
5 CASE, STATED THAT IN A CASE INVOLVING NONDISCLOSURE OF
6 INFORMATION, CLEAR AND CONVINCING EVIDENCE MUST SHOW THAT THE
7 APPLICANT MADE THE DELIBERATE DECISION TO WITHHOLD A KNOWN
8 MATERIAL REFERENCE, AND IN REACHING THIS DECISION, THE
9 TESTIMONY OF THE INVENTORS AND THE PROSECUTING ATTORNEY ARE
10 RELEVANT.

11 IN THIS CASE, OBVIOUSLY, MR. YORKS WAS THE PROSECUTING
12 ATTORNEY, AND THAT IS THE REASON THAT MITCHELL WANTS TO DEPOSE
13 HIM. I HAVE TO SAY, I HAVE SOME CONCERNS ABOUT THIS BECAUSE
14 MITCHELL HAS NOT ALLEGED THIS DEFENSE, AND WE ARE AT THE CLOSE
15 OF FACT DISCOVERY. HOWEVER, GIVEN THE LAW SET FORTH BY THE FED
16 CIRCUIT, I DO BELIEVE THAT MITCHELL HAS A RIGHT TO DEPOSE HIM.
17 I FIND, HOWEVER, THAT THE SCOPE OF THE DEPOSITION NEEDS TO BE
18 LIMITED. I AM CONCERNED ABOUT THE ISSUES RAISED BY AUDALEX
19 REGARDING MR. YORKS' CURRENT INVOLVEMENT IN RELATED LITIGATION
20 OR RELATED PROCEEDINGS IN FRONT OF THE PTO.

21 WHAT I INTEND TO DO IS LIMIT THE SCOPE OF DISCOVERY TO
22 ISSUES RELATING TO THE PRIOR ART REFERENCES THAT WERE CITED OR
23 ALLEGEDLY NOT CITED IN THE ORIGINAL APPLICATIONS FOR THE
24 PATENT-IN-SUIT AND DURING THE ORIGINAL U.S. PTO PROCEEDINGS.
25 WE'RE NOT GOING BEYOND THAT. SO I WANT THIS LIMITED TO THAT

1 TIME FRAME AND INFORMATION REGARDING PRIOR ART THAT WAS EITHER
2 CITED OR NOT CITED.

3 I HAD A QUESTION. I SAW THAT TANYA WILKINS WAS BEING
4 DEPOSED EARLIER THIS WEEK, OR LAST WEEK ON THIS ISSUE, AS
5 AUDALEX'S 30(B)(6) WITNESS. WHAT HAPPENED WITH THAT
6 DEPOSITION?

7 MR. MCPHIE: YOUR HONOR, IF I MAY?

8 THE COURT: YES.

9 MR. MCPHIE: OUR WITNESS IN FACT PROVIDED TESTIMONY
10 ON THIS VERY ISSUE AND DISCLOSED THE ANSWER. AND THE REASON
11 THE NONDISCLOSURE -- OR THE ALLEGED NONDISCLOSURE IS PART OF
12 THAT 30(B)(6) TESTIMONY. AND I HAVE THAT HERE. WE ONLY -- WE
13 DIDN'T HAVE THE TRANSCRIPT. I CAN TELL YOU WHAT SHE SAID.

14 THE COURT: DID SHE IDENTIFY PRIOR ART THAT WAS NOT
15 PROVIDED TO THE PTO AND REASONS FOR IT?

16 MR. MCPHIE: YEAH. SO OUR UNDERSTANDING IS THAT THE
17 PRIMARY PRIOR ART THAT MITCHELL IS CONCERNED ABOUT HAS TO DO
18 WITH MITCHELL'S PRIOR ART PRODUCTS THAT WERE AVAILABLE BEFORE
19 THE FILING OF THE INITIAL PATENT APPLICATION. THERE IS A
20 PRODUCT CALLED "FIRST ESTIMATE" AND A PRODUCT CALLED "IN
21 TOTAL." AT THE DEPOSITION, MITCHELL ASKED AUDATEX 30(B)(6)
22 WITNESS, CAN YOU TELL ME WHY AUDATEX DID NOT DISCLOSE THE FIRST
23 ESTIMATE PRODUCT TO THE PATENT OFFICE IN CONJUNCTION WITH THE
24 PATENTS AT ISSUE IN THIS CASE. SHE FIRST STATED SHE DIDN'T
25 HAVE FIRSTHAND KNOWLEDGE, BUT SHE HAD BEEN EDUCATED, AND SHE

1 SAID -- IN SPEAKING WITH HIM ABOUT WHAT WAS GOING ON AT THE
2 TIME, THEY SAID THAT THEY DID NOT KNOW THAT CERTAIN PRODUCTS
3 EVEN EXISTED. THEY THOUGHT THEY WERE PRODUCTS LIKE FIRST
4 ESTIMATE THAT ONLY HANDLED ESTIMATING AND DIDN'T HAVE ANYTHING
5 TO DO WITH THE TOTAL LOSS. SO, THEREFORE, IT'S NOT RELEVANT.
6 AND I BELIEVE THAT THE PATENT ITSELF LISTS SOME REFERENCES OF
7 THINGS THAT OUR -- THAT OUR PROCESS DID VET OUT TO SAY HERE ARE
8 SOME EXAMPLES OF THINGS THAT WE FOUND THAT WE DON'T DO, THAT
9 THEY ARE THE SAME THING AS WHAT WE ARE INVENTING, BUT THIS IS
10 WHAT WE FOUND IN OUR SEARCH. I THINK THERE ARE SEVERAL
11 EXAMPLES LISTED THERE. AND SO THAT IS THE TESTIMONY, AND IT
12 GOES ON FOR A FEW MORE PAGES ABOUT THAT REFERENCE.

13 THE POINT MADE OR FOLLOWING THAT, NO. 1, THAT MANY OF THE
14 INVENTORS WEREN'T AWARE OF THE REFERENCE; 2, THE ONES THAT DID
15 HAVE AN AWARENESS OF THE REFERENCE DID NOT KNOW IN DETAIL HOW
16 IT OPERATED; THREE, THAT THEIR UNDERSTANDING OF THE OPERATION
17 OF THE REFERENCE WAS THAT IT WAS LIMITED TO A PARTIAL LOSS,
18 ESTIMATING ESTIMATE, AND NOT A TOTAL LOSS SYSTEM, WHICH IS WHAT
19 -- HIS EMBODIMENT PATENT IN THIS CASE.

20 AND FINALLY THAT THERE WERE, IN FACT, A NUMBER OF OTHER
21 REFERENCES THAT DISCLOSE WEB-BASED PARTIAL LOSS REFERENCES THAT
22 WERE, IN FACT, CONSIDERED BY THE PATENT OFFICE. IN OTHER
23 WORDS, THESE OTHER REFERENCES, EVEN TO THE EXTENT THEY WERE
24 RELEVANT, WERE CUMULATIVE.

25 THE COURT: OKAY. MITCHELL, ANYTHING YOU'D --

1 MR. WHITE: YES. SO WE DID ASK HER THOSE QUESTIONS.
2 BUT ON THE ISSUE OF WHETHER OR NOT THE INVENTORS KNEW ABOUT
3 THEM, THESE SYSTEMS ARE DESCRIBED AS SEVERAL DOCUMENTS,
4 MULTIPLE DOCUMENTS. SO I DON'T THINK -- I DON'T THINK THAT
5 THAT IS FAIR TO SAY THAT THE PLAINTIFFS DIDN'T KNOW ABOUT THEM.
6 WE ALSO DON'T KNOW WHAT OTHER SYSTEMS MAY HAVE OR MAY NOT HAVE
7 BEEN DISCLOSED TO THE ATTORNEYS. SO WE KNOW A LITTLE BIT FROM
8 SOME OF THE INVENTORS. WE HAVEN'T TALKED ABOUT ALL OF THEM
9 YET, WHAT INFORMATION FROM THE INVENTORS TO THE LAWYERS. THE
10 LAWYERS ACT AS SORT OF A STOP GAP IN PRESENTING FROM THE PATENT
11 OFFICE. WE DON'T KNOW WHAT INFORMATION ENDED WITH THE LAWYER.
12 WE KNOW THE SYSTEMS WERE NOT DISCLOSED TO THE PATENT OFFICE,
13 AND THERE CAN BE OTHER THINGS THAT WERE DISCLOSED TO LAWYERS
14 THAT WERE NOT DISCLOSED TO THE PATENT OFFICE. SO WE WANT TO
15 EXPLORE. WE NARROWED IT TO THE -- NO OTHER ISSUES BEYOND THE
16 SCOPE YOU SUGGESTED. BUT WE THINK WE HAVE TO ASK THOSE
17 QUESTIONS IN ORDER TO DETERMINE WHETHER OR NOT THERE IS AN
18 ISSUE HERE.

19 THE COURT: OKAY.

20 MR. WHITE: AND WITH RESPECT TO THE PLEADINGS, WE
21 HAVEN'T DONE -- BECAUSE IT'S A FRAUD AND HIGH STANDARD, WE
22 DIDN'T WANT TO -- (INAUDIBLE).

23 THE COURT: BUT YOU'RE WAY LATE TO BE GETTING A
24 DEPOSITION IN THE HOPES OF -- I THINK THERE IS LEGITIMATE
25 QUESTION AS TO WHETHER EVEN IF YOU FOUND OUT EVIDENCE OF IT,

1 WHETHER YOU CAN AMEND THIS LATE IN THE GAME.

2 MR. WHITE: BUT DEFINITELY BRINGING THAT MOTION,
3 EVERYTHING IS DELAYED. YOU CAN TALK ABOUT THIS --

4 THE COURT: NO, NO. SO I -- BECAUSE THE FED CIRCUIT
5 HAS MADE IT CLEAR THAT IN CONSIDERING INEQUITABLE CONDUCT
6 DEFENSE, THAT THE TESTIMONY OF THE INVENTORS AND THE
7 PROSECUTING ATTORNEY ARE RELEVANT, I AM GRANTING MITCHELL'S
8 MOTION TO DEPOSE MR. YORKS. BUT I AM LIMITING THAT VERY
9 SIGNIFICANTLY ONLY TO ISSUES RELATING TO PRIOR ART, INFORMATION
10 THAT HE HAD REGARDING PRIOR ART AT THE TIME OF THE APPLICATION
11 AND IN THE INITIAL PROCEEDINGS IN FRONT OF THE PATENT OFFICE.
12 WE'RE NOT GOING BEYOND THAT SCOPE. DO YOU UNDERSTAND, COUNSEL?

13 MR. WHITE: YES, YOUR HONOR.

14 THE COURT: OKAY. THE SECOND ISSUE IS MITCHELL'S
15 MOTION TO DEPOSE ANTHONY AQUILA. AM I SAYING THAT RIGHT,
16 "AQUILA"?

17 MR. WHITE: I BELIEVE IT IS "AQUILA."

18 THE COURT: THANK YOU. ANTHONY AQUILA, HE'S THE
19 FOUNDER, PRESIDENT, AND CEO OF SOLERA HOLDINGS. AUDATEX IS
20 OPPOSED BECAUSE HE'S AN APEX WITNESS. AND MITCHELL SET FORTH A
21 NUMBER OF BASES ON WHICH THEY WANT TO DEPOSE HIM. INITIALLY, I
22 WANT TO SAY THAT MR. AQUILA'S DECISION TO SWITCH JOBS AND LEAVE
23 MITCHELL, THEN EITHER CREATE OR JOIN SOLERA MORE THAN TEN YEARS
24 AGO OR ABOUT TEN YEARS AGO IS IRRELEVANT TO THE ISSUES IN THE
25 INSTANT LITIGATION.

1 I UNDERSTAND MITCHELL'S ARGUMENT AS TO WHY THEY THINK IT'S
2 RELEVANT, AND I STRONGLY DISAGREE. I FOUND THAT EVEN UNDER THE
3 BROAD DISCOVERY STANDARD THAT IS APPLICABLE, THAT THAT ISSUE IS
4 VERY SPECULATIVE. EVEN MITCHELL SAYS THAT IT MAY LEAD TO THE
5 DISCOVERY OF ADMISSIBLE EVIDENCE, AND DISCOVERY CLOSES
6 TOMORROW. IT'S NOT GOING TO LEAD TO ADMISSIBLE EVIDENCE. SO
7 ON THAT ISSUE, I DENY IT BECAUSE IT'S IRRELEVANT.

8 ON THE NEXT ISSUE, ALL OF THE OTHER THINGS THEY WANTED TO
9 ASK HIM ABOUT, I FIND THAT HE IS AN APEX WITNESS. I DON'T FIND
10 THAT'S EVEN CLOSE. I FIND THAT THAT STATUS HAS EASILY BEEN
11 ESTABLISHED. I DID REVIEW HIS -- ALL OF THE INFORMATION ON
12 THAT. SO ONCE I DETERMINED THAT HE IS AN APEX WITNESS, THEN
13 THE QUESTION IS, WHETHER HE CAN BE DEPOSED. AND THE COURTS
14 HAVE TRADITIONALLY STATED THAT IN DECIDING WHETHER TO ALLOW AN
15 APEX DEPOSITION, COURTS SHOULD CONSIDER WHETHER THE HIGH LEVEL
16 DEPONENT HAS UNIQUE, NONCUMULATIVE KNOWLEDGE OF THE FACTS AT
17 ISSUE; AND TWO, WHETHER THERE ARE OTHER LESS BURDENSOME
18 METHODS. LET'S SEE, CITING WEBSITE STORY, INC. VS. NETRATINGS,
19 INC., 2007 WESTLAW 1120567, AT 2, PAGE 2, AND SOLARCITY, INC.
20 VS. ULTRA CLEAN HOLDING, A 2007 CASE, OUT OF THE NORTHERN
21 DISTRICT OF CALIFORNIA.

22 AND THE COURTS HAVE STATED THAT WHEN A HIGH LEVEL
23 CORPORATE EXECUTIVE LACKS UNIQUE OR SUPERIOR KNOWLEDGE OF THE
24 FACTS IN DISPUTE, COURTS HAVE FOUND THAT GOOD CAUSE EXISTS TO
25 PROHIBIT THE DEPOSITION. THIS IS ESPECIALLY SO WHEN THE

1 INFORMATION SOUGHT IN THE DEPOSITION CAN BE OBTAINED THROUGH
2 LESS INTRUSIVE DISCOVERY METHODS, SUCH AS INTERROGATORY
3 THEORIES, OR FROM DEPOSITIONS OF LOWER-LEVEL EMPLOYEES WITH
4 MORE DIRECT KNOWLEDGE OF THE FACTS AT ISSUE.

5 CERTAINLY, THE FACT THAT YOU'RE AN APEX WITNESS DOES NOT
6 PROHIBIT CATEGORICALLY YOUR DEPOSITION, BUT IT IS SOMETHING
7 THAT THE COURT NEEDS TO CONSIDER. AFTER REVIEWING HIS
8 DECLARATION AND THE OTHER EVIDENCE SUBMITTED, AS I SAID, I
9 DID -- OR I DO FIND THAT HE IS AN APEX WITNESS, AND I ALSO FIND
10 THAT MITCHELL HAS NOT SATISFIED THE ELEMENTS REQUIRED TO DEPOSE
11 HIM. MITCHELL INDICATED THAT THEY WANTED TO DEPOSE HIM ON HIS
12 KNOWLEDGE OF MITCHELL'S OWN PRODUCTS IN EARLY 2000, WHEN HE
13 WORKED FOR THEM, AND ABOUT A PATENT THAT WAS CITED AS RELEVANT
14 ART IN THE APPLICATION FOR A PATENT AT ISSUE IN THIS
15 LITIGATION.

16 INITIALLY, I FIND THAT THEY HAVE NOT IDENTIFIED ANY UNIQUE
17 INFORMATION THAT HE HAS WITH REGARD TO MITCHELL'S OWN PRODUCTS.
18 COMMON SENSE INDICATES THAT THERE ARE LIKELY NUMEROUS MITCHELL
19 EMPLOYEES WHO HAVE THE SAME OR BETTER INFORMATION REGARDING
20 MITCHELL'S OWN PRODUCTS. IN ADDITION, MITCHELL HAS NOT
21 IDENTIFIED ANY FACTS, E-MAILS, DOCUMENTS, TESTIMONY, OR
22 ANYTHING ELSE INDICATING THAT MR. AQUILA HAS UNIQUE
23 INFORMATION. I HAVE REVIEWED HIS DECLARATION, AND I THINK IT
24 SUPPORTS THE COURT'S CONCLUSIONS ON THIS FACT. AND MITCHELL
25 HAS NOT PROVIDED ANY CONTRADICTORY EVIDENCE.

1 ON THE PRIOR ART ISSUE, HE IS ONE OF NINE INVENTORS. AND
2 THE OTHER INVENTORS, PRESUMABLY WHO DO NOT WORK FOR AN ENTITY
3 RELATED TO AUDATEX, HAVE NOT BEEN DEPOSED. IN ADDITION,
4 AUDATEX ASSERTS THAT THE PRIOR ART PATENT IS ASSIGNED TO
5 MITCHELL, AND SOME OF THE INVENTORS ARE MITCHELL EMPLOYEES. AS
6 A RESULT, I FIND THAT MITCHELL HAS NOT ESTABLISHED THAT HE HAS
7 ANY UNIQUE NONCUMULATIVE KNOWLEDGE OF THE FACTS AT ISSUE, AND I
8 FIND THEY HAVEN'T SATISFIED THE FIRST ELEMENT.

9 I ALSO FIND THAT THEY HAVEN'T SATISFIED THE SECOND
10 ELEMENT. BECAUSE THEY HAVEN'T ESTABLISHED THAT THERE ARE OTHER
11 WAYS TO GET THIS, ESPECIALLY FROM THEIR OWN EMPLOYEES.
12 MITCHELL ARGUES THAT THEY HAVE THE RIGHT TO DEPOSE ANYONE WITH
13 KNOWLEDGE; THEY DON'T HAVE TO DEPOSE THE MOST KNOWLEDGEABLE.
14 AND CERTAINLY THAT IS TRUE. HOWEVER, IN THIS CASE, HE'S AN
15 APEX WITNESS, AND THEY HAVE NOT ESTABLISHED THE NEED FOR HIS
16 TESTIMONY. IN FACT, IT APPEARS TO ME THAT THE REASON THEY WANT
17 TO DEPOSE THIS INDIVIDUAL, AS OPPOSED TO ALL OF THE OTHERS WITH
18 SIMILAR KNOWLEDGE, IS THE FACT THAT HE LEFT MITCHELL AND WENT
19 TO WORK FOR SOLERA, WHICH IS RELATED TO AUDATEX. THEREFORE,
20 THAT MOTION IS DENIED.

21 THE NEXT MOTION IS AUDATEX'S MOTION TO COMPEL DAMAGE
22 DISCOVERY. AND I'M GRANTING THAT. I'VE GRANTED IT BEFORE. I
23 GRANTED IT THE FIRST TIME. I GRANTED IT ON RECONSIDERATION.
24 AND I'M NOW GRANTING IT ON ANOTHER MOTION. ALL OF THE SAME
25 ARGUMENTS ARE BEING MADE BY MITCHELL. I'M ACTUALLY NOT GOING

1 TO GO BACK THROUGH ALL OF THOSE ARGUMENTS, AND I REFERENCE MY
2 PRIOR ORDER ON THIS CASE AND MY ORDER ON RECONSIDERATION. THE
3 INITIAL DISCOVERY REQUESTS FROM AUDATEX SOUGHT INFORMATION FROM
4 THE 2000 -- FROM 2006 TO THE PRESENT. AUDATEX OPPOSED ON --
5 MITCHELL OPPOSED ON THE BASIS THAT AUDATEX WAS NOT GOING TO BE
6 ABLE TO ESTABLISH DAMAGES UNDER 35, U.S.C., SECTION 154(D) AND
7 SO REFUSED TO ANSWER. I OVERRULED THAT, REQUIRED THEM TO
8 ANSWER. THEY THEN APPARENTLY IGNORED THE FACT THAT THE REQUEST
9 WAS 2006 TO THE PRESENT, AND THEY PROVIDED ONLY DOCUMENTS FROM
10 MARCH OF 2011.

11 I FIND THERE IS NO BASIS FOR WHAT THEY'RE DOING. AS I
12 INDICATED, THERE CLEARLY STATED IN MY ORIGINAL ORDER, THE COURT
13 IS NOT ASKING -- IS NOT BEING ASKED TO DECIDE WHETHER AUDATEX
14 IS ENTITLED TO DAMAGES UNDER SECTION 154(D). I MAKE NO RULING,
15 WHATSOEVER, ON THAT ISSUE. HOWEVER, DISCOVERY UNDER RULE 26 IS
16 VERY BROAD. AND AUDATEX IS ENTITLED TO DAMAGES RELATING TO
17 CLAIMS THAT THEY'RE MAKING. THEY'RE MAKING THIS CLAIM, THEY'RE
18 ENTITLED TO THESE DAMAGES. SO ONCE AGAIN, THIS MOTION TO
19 COMPEL IS GRANTED. I INITIALLY REQUIRED THIS TO BE PRODUCED
20 MANY MONTHS AGO. I, THEREFORE, AM ORDERING MITCHELL TO PRODUCE
21 THE REQUESTED DOCUMENTS AND PROVIDE A SUPPLEMENTAL RESPONSE BY
22 MONDAY, FEBRUARY 2ND.

23 MR. WHITE: CAN I --

24 THE COURT: SURE.

25 MR. WHITE: SO THE ISSUE OF 154 WAS NOT SQUARELY

1 BEFORE -- BEFORE, IN FACT, THEY AMENDED DURING INTERROGATORY
2 RESPONSE AFTER THE ORIGINAL MOTION TO GRANT, THE MOTION TO
3 COMPEL WAS GRANTED. THAT WAS A SUPPLEMENTAL. THEY DIDN'T
4 RAISE 154, A SPECIFIC BASIS, PRE-ISSUANCE DAMAGES, AND THEY
5 DIDN'T PROVIDE ANY BASIS UNTIL AFTER THAT. SO I JUST WANT --
6 WE WILL ABIDE BY YOUR ORDER. WE DON'T WANT YOU TO THINK WE
7 WERE WILLFULLY IGNORING YOUR ORDER. THIS WHOLE ISSUE OF
8 PRE-ISSUANCE DAMAGES WAS NOT TEE'D UP UNTIL AFTER THE FIRST
9 MOTION TO COMPEL WAS GRANTED.

10 THE COURT: WELL, MY FIRST ISSUE, THEIR REQUEST WAS
11 ANNUAL STATEMENTS FROM 2006 TO THE PRESENT. AND I GRANTED IT.

12 MR. WHITE: I UNDERSTAND.

13 THE COURT: AND YOU ONLY PROVIDED IT -- YOU
14 RECONSIDERED ON -- YOU ONLY PROVIDED IT ON CERTAIN PRODUCTS. I
15 HAD TO FILE ANOTHER MOTION SAYING MORE PRODUCTS. I DIDN'T
16 REALIZE AT THE TIME THAT YOU HADN'T PROVIDED THE FULL TIME
17 PERIOD, SO NOW WE'RE ON OUR THIRD MOTION. I'M GRANTING IT.
18 PROVIDE THAT INFORMATION BY MONDAY.

19 ALL RIGHT. THE NEXT ONE IS AUDATEX'S MOTION FOR APPROVAL
20 OF DR. SULLIVAN AS AN EXPERT. AND MITCHELL WAS OPPOSED TO THIS
21 BECAUSE THEY CONTACTED WITH DR. SULLIVAN AND HIS COMPANY,
22 INTENSITY CORP. AND THEY'RE CONCERNED -- THEY BELIEVE THEY
23 PROVIDED CONFIDENTIAL INFORMATION TO HIM THAT MAKES HIM UNABLE
24 THEN TO -- CREATES A CONFLICT THAT SHOULD PREVENT HIM FROM
25 SERVING AS AN EXPERT FOR AUDATEX. I HAVE REVIEWED THE

1 DECLARATIONS THAT HAVE BEEN SUBMITTED BY BOTH DR. SULLIVAN AND
2 THE RAVI NEMANI -- AM I SAYING THAT RIGHT? IS HE YOUR WITNESS?

3 MR. WHITE: IT IS A SHE.

4 THE COURT: I'M SORRY, THAT'S HOW BAD IT IS. OKAY.
5 RAVI NEMANI.

6 MR. WHITE: THAT IS CLOSE ENOUGH.

7 THE COURT: ALL RIGHT. THANK YOU. SO I REVIEWED
8 BOTH OF THOSE DECLARATIONS. AND OBVIOUSLY THERE IS A
9 PROTECTIVE ORDER IN PLACE HERE THAT GOVERNS THE PRODUCTION OF
10 INFORMATION TO EXPERTS. FOR EXPERT DISQUALIFICATION, THE
11 PARTIES GENERALLY FOLLOW -- OR SORRY, THE COURT GENERALLY
12 FOLLOWS A TWO PART -- OR APPLIES A TWO-PART TEST. FIRST, COULD
13 THE PARTY CLAIMING A CONFLICT REASONABLY CONCLUDE THAT IT HAD A
14 CONFIDENTIAL RELATIONSHIP WITH THE EXPERT; AND TWO, DID THAT
15 PARTY DISCLOSE ANY CONFIDENTIAL OR PRIVILEGED INFORMATION TO
16 THE EXPERT? THAT STANDARD HAS BEEN SET FORTH IN A NUMBER OF
17 CASES, INCLUDING ALIEN TECHNOLOGY CORP VS. INTERMEC, INC., A
18 2007 WESTLAW 4261972 AT 1, OUT OF -- AND ALSO A 2012 CASE OUT
19 OF SAN DIEGO, PELLERIN VS. HONEYWELL INTERNATIONAL, 2012,
20 WESTLAW 112539, AT 2.

21 IN REACHING THIS DECISION, SOME COURTS HAVE DISTINGUISHED,
22 QUOTE, CONFIDENTIAL INFORMATION THAT RELATES TO PURELY
23 TECHNICAL OR BUSINESS INFORMATION THAT IS DISCOVERABLE IN
24 LITIGATION, AND INFORMATION THAT RELATES TO CONFIDENTIAL
25 COMMUNICATIONS CONCERNING LEGAL STRATEGIES AND OTHER

1 LITIGATION-RELATED ISSUES THAT IS PRIVILEGED AND NOT OTHERWISE
2 SUBJECT TO DISCOVERY, CLOSED QUOTES. THAT IS SAUL VS. SPRINT
3 NEXTEL CORP, 2013 WESTLAW 501783, AT PAGE 7, THAT IS FROM
4 KANSAS.

5 AND THE NORTHERN DISTRICT OF CALIFORNIA HAS REACHED A
6 SIMILAR DECISION IN RE JDS UNIPHASE CORP SECURITIES LITIGATION.

7 COURTS ALSO NEED TO CONSIDER IN EVALUATING THIS TWO-PART
8 TEST POLICY CONSIDERATIONS INCLUDING THE RIGHT OF THE PARTY TO
9 RETAIN AN EXPERT OF ITS OWN CHOOSING, THE PREJUDICE THE
10 RETAINING PARTY MIGHT EXPERIENCE IF NOT ALLOWED TO CHOOSE ITS
11 OWN EXPERT AND MAINTAINING THE INTEGRITY OF THE JUDICIAL
12 PROCESS. THE PARTY SEEKING DISQUALIFICATION BEARS THE BURDEN
13 OF SHOWING THE EXISTENCE OF THE CONFIDENTIALITY AND ITS
14 NONWAIVER.

15 IN THIS CASE, INITIALLY, I THINK IT'S SOMEWHAT UNCLEAR
16 WHETHER MITCHELL ACTUALLY HAD THE REQUISITE CONFIDENTIAL
17 RELATIONSHIP WITH DR. SULLIVAN. AS THE DECLARATIONS FROM BOTH
18 INDIVIDUALS INDICATE, MITCHELL AND DR. SULLIVAN DID EXECUTE A
19 NONDISCLOSURE AGREEMENT, NDA, WHICH WAS BACKDATED TO APPLY TO
20 THE SECOND MEETING BETWEEN THE TWO ENTITIES OR INDIVIDUALS.
21 BUT THE NDA DEFINES THE SCOPE OF THE PROJECT AS, QUOTE,
22 DISCUSSIONS AND INFORMATION RELATED, BUT NOT LIMITED TO A
23 POTENTIAL BUSINESS RELATIONSHIP REGARDING DATA ASSETS. THIS
24 LANGUAGE DOES NOT CLEARLY ESTABLISH THAT REQUISITE CONFIDENTIAL
25 INFORMATION OF -- OR EXCUSE ME, CONFIDENTIAL RELATIONSHIP. BUT

1 THE BIGGER ISSUE TO ME IS THE SECOND ELEMENT, AND THAT IS, I
2 FIND THAT MITCHELL HAS NOT ESTABLISHED THAT THERE WAS A
3 DISCLOSURE OF CONFIDENTIAL OR PRIVILEGED INFORMATION THAT
4 AFFECTS DR. SULLIVAN'S WORK WITH AUDATEX IN THIS CASE. WITHOUT
5 PROVIDING ANY SPECIFIC INFORMATION THAT IT DISCLOSED, MITCHELL
6 CLAIMED THAT MS. RAVI NEMANI'S DECLARATION, THAT IT SHARED,
7 QUOTE, SPECIFIC DETAILS ABOUT MITCHELL'S POTENTIAL NEW DATA
8 PRODUCTS, CLOSED QUOTES, AND DISCUSSED HOW INTENSITY COULD
9 SUPPORT THE, QUOTE, DEVELOPMENT AND RELEASE OF THESE NEW
10 PRODUCTS, CLOSED QUOTE.

11 MITCHELL DOES NOT EXPLAIN HOW THIS INFORMATION, THE NEW
12 DATA PRODUCTS, RELATE IN ANY WAY TO THE LEGAL STRATEGIES OR
13 LITIGATION-RELATED ISSUES IN GENERAL OR SPECIFICALLY IN THIS
14 CASE. I FIND THAT DR. SULLIVAN'S INTERACTIONS WITH MITCHELL
15 WERE VERY, VERY -- AT THE VERY BEGINNING OF THAT RELATIONSHIP,
16 THERE MAY HAVE BEEN SOME INFORMATION THAT MITCHELL PROVIDED TO
17 HIM, BUT BECAUSE IT IS RELATING TO THESE NEW DATA PRODUCTS AND
18 HOW THEY COULD RELEASE NEW PRODUCTS, TO THE EXTENT THAT THEY
19 DID PROVIDE ANY CONFIDENTIAL INFORMATION, I DON'T SEE HOW THAT
20 AFFECTS IN ANY WAY HIS WORK WITH AUDATEX ON THESE PRODUCTS AND
21 PATENTS THAT HAD BEEN IN PLACE FOR A WHILE. I FIND THAT THERE
22 IS NO CONNECTION BETWEEN THOSE TWO, AND THAT MITCHELL DIDN'T
23 PROVIDE THAT INFORMATION OR MAKE THAT -- ESTABLISH THAT FACT.

24 IN ADDITION, AUDATEX DID PROVIDE EVIDENCE INDICATING THAT
25 IT WOULD BE PREJUDICED BY HIS DISQUALIFICATION BECAUSE IT HAS

1 ALREADY PAID HIM A SUBSTANTIAL AMOUNT OF MONEY FOR THE WORK
2 THAT HE HAS DONE AND IS DOING.

3 ALSO, MITCHELL DOES NOT ADDRESS WHY THE PROVISIONS OF THE
4 PROTECTIVE ORDER ARE NOT SUFFICIENT TO PROTECT THEM IN THIS
5 SITUATION. GIVEN ALL OF THE FACTS OF THIS CASE, I FIND THAT
6 DR. SULLIVAN DID NOT HAVE A RELATIONSHIP WITH MITCHELL THAT
7 PREVENTS HIM FROM SERVING AS AN EXPERT FOR AUDATEX IN THIS
8 LITIGATION. I, THEREFORE, GRANT AUDATEX'S MOTION TO APPROVE
9 HIM AND DENY MITCHELL'S ARGUMENTS THAT HE SHOULD BE
10 DISQUALIFIED FROM THIS LITIGATION.

11 MR. WHITE: CAN I ASK ONE QUESTION, YOUR HONOR?

12 THE COURT: SURE.

13 MR. WHITE: THERE WAS A SEPARATE INDEPENDENT GROUNDS
14 FOR OUR MOTION, I GUESS -- OR THEIR MOTION, AND EXPLAIN THE --
15 SO THERE ARE TWO WAYS THAT WE THINK --

16 THE COURT: YEAH. I WENT THROUGH AND I LOOKED AT THE
17 PROTECTIVE ORDER. I DON'T THINK THAT THE PROTECTIVE ORDER, IT
18 DOES DISQUALIFY HIM. I LOOKED AT PARAGRAPH 11 AND PARAGRAPH 4
19 THAT ADDRESSES THE DEFINITION OF INDEPENDENT EXPERT AND THE
20 EXCHANGE OF CONFIDENTIAL -- THE DEFINITION OF INDEPENDENT
21 EXPERT AND THE EXCHANGE OF CONFIDENTIAL INFORMATION. AND I
22 FIND THAT UNDER THE FACTS OF THIS CASE, THAT THE PROTECTIVE
23 ORDER DOES NOT PREVENT HIM FROM SERVING AS AN EXPERT IN THIS
24 CASE.

25 MR. WHITE: OKAY.

1 THE COURT: ALL RIGHT. OKAY, THEN, AUDATEX FILED A
2 NEW MOTION JANUARY 19TH, TO COMPEL A NUMBER OF ADDITIONAL
3 DISCOVERIES, DEPOSITIONS. THE PARTIES HAVE AGREED THAT A
4 NUMBER OF DEPOSITIONS -- I DIDN'T WRITE DOWN THE NUMBER. MY
5 RECOLLECTION IS IT WAS ABOUT EIGHT OR TEN -- ARE GOING TO GO
6 FORWARD ON SPECIFIC DATES. THEY'RE LISTED ON -- BOTH PARTIES
7 LIST THEM IN THEIR PAPERS. AND I AM NOW REQUIRING, ORDERING,
8 THE DEPOSITIONS TO GO FORWARD ON THE DATES THAT ARE SET FORTH
9 IN AUDATEX'S MOTION AND MITCHELL'S OPPOSITION. THEY'RE THE
10 SAME DATES. THE ONE DEPOSITION THAT DID NOT HAVE A DATE WAS
11 STEVE MORTON. AND THAT WAS ACTUALLY JUST MENTIONED IN
12 MITCHELL'S DOCUMENT. DO YOU GUYS HAVE A DATE FOR THAT?

13 MR. WHITE: WE DON'T HAVE A SPECIFIC DATE YET. HE
14 WAS -- HE HAS BEEN CONTACTED BY AUDATEX. WE HAVE REACHED OUT
15 TO HIM TO FIND A DATE, AND WE'RE HOPING TO SECURE A DATE IN
16 FEBRUARY FOR HIM. AND WE'LL WORK WITH AUDATEX ON SCHEDULING
17 THAT.

18 THE COURT: WHAT HAVE YOU HEARD FROM HIM? IT IS YOUR
19 SUBPOENA?

20 MR. MCPHIE: WE FINALLY DID SUBPOENA HIM. WE
21 UNDERSTOOD INITIALLY THAT COUNSEL FOR MITCHELL IS ACCEPTING
22 SERVICE, AND WE LATER HEARD THAT THEY DID NOT. SO IT SOUNDS
23 LIKE HE NEEDS TO BE TRACKED DOWN. HE WAS ACTUALLY SERVED WITH
24 A SUBPOENA. HE INFORMED US THAT HE COULDN'T GO FORWARD ON THAT
25 DATE.

1 THE COURT: WHAT DATE DID YOU SET IT FOR?

2 MR. MCPHIE: IT WAS THE 28TH, YESTERDAY. BUT IT
3 SOUNDS LIKE MAYBE NOW THERE HAS BEEN SOME COMMUNICATION.

4 MR. WHITE: HE DID CONTACT US. HE IS A FORMER
5 EMPLOYEE OF OURS. HE CONTACTED US, AND WE'RE TRYING TO FIND A
6 DATE TO WORK WITH HIM, AND AUDATEX WILL TRY TO FIND A DATE FOR
7 THIS ISSUE.

8 THE COURT: OKAY. DO YOU WANT ME TO LEAVE THAT OPEN?
9 I DO NOT WANT ANOTHER MOTION FILED ON THIS. ARE YOU GOING TO
10 BE ABLE TO WORK OUT A DATE?

11 MR. WHITE: I THINK SO.

12 THE COURT: IF NOT, I'LL ARBITRARILY SET ONE AS I SIT
13 HERE RIGHT NOW.

14 MR. WHITE: I THINK WE'LL BE ABLE TO WORK ON THAT AND
15 AGREE ON A LOT OF THINGS.

16 THE COURT: YOU DID AGREE ON ALL THE OTHER DEPOSITION
17 DATES. ARE YOU GOING TO BE ABLE TO AGREE ON THIS ONE?

18 MR. WHITE: I ACCEPT COUNSEL'S REPRESENTATION THAT
19 WE'LL GET A DATE (INAUDIBLE).

20 THE COURT: OKAY. THE LAST DEPOSITION IS
21 FEBRUARY 11TH; IS THAT RIGHT?

22 MR. MCPHIE: I BELIEVE THAT IS CORRECT, YOUR HONOR.
23 YES.

24 THE COURT: IS THAT RIGHT? SO FEBRUARY 11TH IS A
25 WEDNESDAY. I'M GOING TO REQUIRE MR. MORTON'S DEPOSITION TO

1 OCCUR BY THE 16TH. CAN YOU GET HIM IN IN THIS TIME? YOU HAVE
2 TWO PLUS WEEKS FROM NOW.

3 MR. WHITE: WE'LL DO EVERYTHING WE CAN. UNLESS HE IS
4 OUT OF THE COUNTRY OR SOMETHING, WE'LL FIND OUT.

5 THE COURT: YOU DON'T KNOW YET?

6 MR. WHITE: I DON'T.

7 MR. MCPHIE: AND OUR PRIMARY CONCERN, THAT I'M
8 GUESSING WE'RE GETTING THERE, IS HOW THIS THING -- (INAUDIBLE).

9 THE COURT: YEAH. SO I'M GOING TO REQUIRE THAT
10 DEPOSITION TO OCCUR BY FEBRUARY 16TH, UNLESS THE TWO OF YOU
11 AGREE TO A DATE AFTERWARDS, THE TWO SIDES. AND THEN IT HAS TO
12 BE QUICKLY. BECAUSE I DON'T KNOW WHO HE IS IN RELATION TO THE
13 NEEDS OF THE -- YOU KNOW, FOR THE EXPERTS. BUT WE'RE MOVING
14 INTO EXPERT DISCOVERY.

15 OKAY. THE NEXT ISSUE IS THE DEPOSITION OF PAUL
16 ROSENSTEIN. THAT TRANSCRIPT IS SEALED. I DON'T BELIEVE THAT
17 THERE IS ANY REASON TO GO INTO ANY OF HIS SPECIFIC TESTIMONY IN
18 ORDER TO RULE ON THIS MOTION. AS BOTH SIDES ACKNOWLEDGE,
19 CLEARLY A 30(B)(6) DEPOSITION IS SEPARATE FROM A DEPOSITION OF
20 AN INDIVIDUAL, AND PARTIES ARE ABLE TO TAKE THE DEPOSITION OF
21 AN INDIVIDUAL, EVEN IF HE OR SHE ALSO SERVED AS A 30(B)(6)
22 WITNESS.

23 THAT BEING SAID, IN THIS CASE, I DID REVIEW THE WHOLE DEPO
24 TRANSCRIPT. IT CLEARLY WAS NOTICED AS A 30(B)(6) DEPOSITION.
25 THE SCOPE OF THE 30(B)(6) CATEGORIES THAT HE WAS TESTIFYING ON

1 WERE VERY NARROW. MITCHELL AND AUDATEX'S COUNSEL REPEATEDLY
2 ASKED QUESTIONS THAT, IN MY OPINION, ARE OUTSIDE THE SCOPE OF
3 THAT 30(B)(6) NOTICE. MITCHELL REPEATEDLY OBJECTED TO THE
4 QUESTIONS AS BEING OUTSIDE THE SCOPE OF THE 30(B)(6), BUT
5 ALLOWED THE WITNESS TO THEN ANSWER THE QUESTIONS. ONE OF THE
6 EARLY EXCHANGES ON THIS DISPUTE WAS -- I THINK WAS PARTICULARLY
7 RELEVANT. AND MITCHELL'S COUNSEL, WHO WAS PRESENT,
8 SPECIFICALLY STATED, JUST SO WE'RE CLEAR -- THIS IS A QUOTE,
9 JUST SO WE'RE CLEAR, OUR POSITION IS, YOU GET HIS PERSONAL
10 DEPOSITION ONE TIME. IF YOU'RE GOING TO DO IT NOW, WE'RE GOING
11 TO OBJECT TO ANY FURTHER DEPOSITION OF HIM. I WANT TO BE CLEAR
12 ON THE RECORD, IF YOU'RE GOING TO PROCEED IN ASKING HIM
13 QUESTIONS WE THINK ARE PERSONAL DEPOSITION QUESTIONS, THAT IS
14 GOING TO BE OUR POSITION GOING FORWARD.

15 AUDATEX'S COUNSEL RESPONDED TO THAT BY STATING, YOU CAN
16 ANSWER THE QUESTION. THERE WERE NUMEROUS OTHER INTERACTIONS
17 BETWEEN THE TWO LAWYERS OVER THIS ISSUE. THERE WERE SEVERAL
18 TIMES WHERE COUNSEL FOR AUDATEX CLARIFIED THE -- QUOTE,
19 CLARIFIED THAT HE DID NOT, QUOTE, BELIEVE THAT THE PRIOR LINE
20 OF QUESTIONING -- DID NOT BELIEVE THAT THE PRIOR LINE OF
21 QUESTIONING IS BEYOND THE SCOPE OF THE 30(B)(6) NOTICE. AND AS
22 I'VE INDICATED OR STATED, BOTH LAWYERS SET FORTH THIS POSITION,
23 NUMEROUS POSITIONS THROUGHOUT THE DEPOSITIONS.

24 WHAT THIS SHOWS ME IS THIS DISPUTE WAS VERY CLEAR ON THIS
25 DATE IN AUGUST, AUGUST 27TH, OF 2014. I BELIEVE, AS I SAID,

1 THAT THERE WERE QUESTIONS BEYOND THE SCOPE OF THE NOTICED
2 30 (B) (6) DEPOSITION. MITCHELL OBJECTED, LET THE WITNESS
3 ANSWER. AND THE WITNESS THEN DID ANSWER ON HIS OWN INDIVIDUAL
4 PERSONAL KNOWLEDGE. AND MITCHELL STATED SPECIFICALLY THAT THIS
5 WAS HIS DEPOSITION, HIS INDIVIDUAL DEPOSITION. AUDATEX CLEARLY
6 STATED THAT THEY DISAGREED WITH THAT POSITION. DESPITE THAT
7 FACT -- AND THAT IS AUGUST, AUDATEX DID NOT TAKE ANY FURTHER
8 ACTION UNTIL FILING THIS MOTION IN JANUARY -- ON JANUARY 19TH,
9 OF THIS YEAR.

10 THIS COURT'S CASE MANAGEMENT ORDER REQUIRES ANY DISCOVERY
11 DISPUTES TO BE BROUGHT TO THE COURT'S ATTENTION WITHIN 30 DAYS
12 OF IMPASSE, BUT NO LATER THAN 60 DAYS AFTER GIVING -- AFTER THE
13 DATE THAT GIVES RISE TO THE DISPUTE. THIS DISPUTE CLEARLY
14 AROSE ON AUGUST 27TH. THE WHOLE REASON I HAVE THAT REQUIREMENT
15 IN THE -- IN THE CASE MANAGEMENT ORDER IS TO PREVENT ISSUES
16 LIKE THIS. WHEN THERE IS CLEARLY A DISPUTE BETWEEN PARTIES, IT
17 NEEDS TO GET RESOLVED. AUDATEX CHOSE, FOR WHATEVER REASON, NOT
18 TO DO ANYTHING WITH THIS UNTIL ALMOST FIVE MONTHS LATER. I
19 FIND, THEREFORE, THAT THEIR MOTION IS UNTIMELY, AND I DENY IT
20 ON THAT BASIS.

21 IN ADDITION, AS I STATED, I DO BELIEVE THAT AUDATEX ASKED
22 QUESTIONS THAT WERE BEYOND THE SCOPE OF THE 30 (B) (6)
23 DEPOSITION, AND THAT MITCHELL ALLOWED THE DEPONENT TO ANSWER
24 THEM IN HIS INDIVIDUAL CAPACITY. THAT WOULD BE AN ALTERNATIVE
25 BASIS TO DENY THE MOTION. I RECOGNIZE THAT IT IS LIKELY THAT

1 HAD AUDATEX HAD ADDITIONAL QUESTIONS, THEY WOULD HAVE ASKED HIM
2 AS AN INDIVIDUAL. SO I THINK THERE COULD BE MORE ARGUMENT ON
3 THE MERITS OF IT, BUT TO ME, THIS WAS A DISPUTE THAT WAS CLEAR
4 IN AUGUST. AND IT SHOULD HAVE BEEN RAISED WITH THE COURT
5 INITIALLY, OR IMMEDIATELY, IF AUDATEX BELIEVED THAT
6 MR. ROSENSTEIN'S INFORMATION WAS IMPORTANT OR RELEVANT. SO I
7 AM DENYING AUDATEX'S MOTION TO DEPOSE -- NO -- YES, I'M DENYING
8 THE MOTION TO DEPOSE MR. ROSENSTEIN AS AN INDIVIDUAL.

9 THE NEXT ISSUE WAS INTERROGATORIES 5 THROUGH 7. RULE
10 26(E)(1) REQUIRES LITIGANTS TO SUPPLEMENT THEIR DISCLOSURES AND
11 INTERROGATORY RESPONSES, QUOTE, A, IN A TIMELY MANNER, IF THE
12 PARTY LEARNS THAT IN SOME MATERIAL RESPECT THE DISCLOSURE OR
13 RESPONSE IS INCOMPLETE OR INCORRECT. AND IF THE ADDITIONAL
14 CORRECTIVE INFORMATION HAS NOT OTHERWISE BEEN MADE TO THE OTHER
15 PARTIES DURING THE DISCOVERY PROCESS OR IN WRITING, OR B, AS
16 ORDERED BY THE COURT.

17 IN THIS CASE, BOTH PARTIES INDICATE THAT THE SUPPLEMENTAL
18 INFORMATION WAS PROVIDED DURING A DEPOSITION. AS SUCH, IT HAS
19 OTHERWISE BEEN MADE TO THE -- HAS OTHERWISE BEEN MADE KNOWN TO
20 THE OTHER PARTIES DURING THE DISCOVERY PROCESS, AND I,
21 THEREFORE, AM NOT GOING TO ORDER MITCHELL TO SUPPLEMENT THE
22 INTERROGATORIES THAT WERE IDENTIFIED.

23 I DO BELIEVE THAT INFORMATION HAS BEEN MADE KNOWN TO
24 AUDATEX FROM THE DEPOSITION. HOWEVER, I DO WANT TO REMIND BOTH
25 PARTIES THAT THEY DO HAVE A CONTINUING OBLIGATION UNDER RULE 26

1 TO SUPPLEMENT ANY RESPONSES IF NECESSARY. YOU'RE ALL GOOD
2 LAWYERS. YOU KNOW WHAT THAT MEANS.

3 SO I AM DENYING AUDATEX'S MOTION ON THAT RESPECT.

4 ACCESS TO EXECUTABLE AND SOURCE CODE OF THE ACCUSED
5 PRODUCTS DURING DEPOSITION. IS THAT NOW MOOT, OR IS IT STILL
6 RELEVANT TO THE REMAINING DEPOSITIONS?

7 MR. MCPHIE: IT IS RELEVANT, YOUR HONOR. THERE HAS
8 BEEN A DEVELOPMENT THERE. WE TRIED TO PROPOSE MAYBE A
9 COMPROMISE, AND WE'RE NOT QUITE THERE YET. ONE OF THE ISSUES
10 THAT WAS RAISED IN MITCHELL'S OPPOSITION WAS THAT THE SOURCE
11 CODE WAS TO BE PRODUCED AT COUNSEL'S OFFICE, IN THIS CASE, IN
12 IRVINE, CALIFORNIA. AND THERE IS SOME RELUCTANCE TO HAVE THAT
13 SOURCE CODE MOVED TO ANOTHER LOCATION. UNDER THE -- WHAT WE
14 HAD PROPOSED WAS THAT TO SATISFY OUR CONCERNS ABOUT HAVING THAT
15 VARIABLE AS NEEDED DURING THE DEPOSITION, THAT THE DEPOSITION
16 TAKE PLACE AT THAT OFFICE IN IRVINE. AND SEEING THAT WAS MAYBE
17 A WAY OF ADDRESSING THE PROTECTIVE ORDER ISSUES, BUT ALSO
18 ALLOWING FOR US TO HAVE ACCESS TO THAT DURING THE DEPOSITIONS.

19 THE COURT: WHAT IS MITCHELL'S POSITION? ARE YOU
20 WILLING TO AGREE TO THAT?

21 MR. WHITE: WE'RE NOT, YOUR HONOR. AND TWO REASONS,
22 FIRST, IS THAT IT'S NOT CONVENIENT FOR OUR WITNESSES. IT IS
23 ADDITIONAL TRAVEL. BUT MORE IMPORTANTLY, THERE WAS NEVER ANY
24 CONTEMPLATION OF PRODUCING THIS SOURCE CODE IN THIS MANNER. IT
25 WAS A HEAVILY NEGOTIATED SOURCE CODE PROTECTIVE ORDER. WE

1 AGREED HOW THAT WOULD BE HANDLED. IT SPECIFICALLY ADDRESSES
2 HOW THE SOURCE CODE IS TO BE USED DURING DEPOSITIONS. IT SAYS
3 IN A PRINTED FORMAT. SO THIS IDEA THAT WE NEED TO PROVIDE THEM
4 WITH A COMPUTER, I'M NOT EVEN SURE WHAT ALL HAS TO BE ON IT FOR
5 THEIR USE. I GUESS SIMULTANEOUSLY WITH THE DEPOSITION OF OUR
6 FOLKS -- I MEAN, IT IS JUST A LOT OF ADDITIONAL REQUIREMENTS
7 BURDENED ON US THAT WAS NEVER CONTEMPLATED OR DISCUSSED WITH
8 THE PARTIES BEFORE THIS OR ADDRESSED IN THE SOURCE CODE
9 PROTECTIVE ORDER. FOR THAT REASON --

10 THE COURT: OKAY, THAT IS WHAT I WANTED TO SEE, IF
11 YOU REACHED AN AGREEMENT.

12 MR. MCPHIE: AND AS A PRACTICAL MATTER, AND THIS IS
13 FROM EXPERIENCE, IN SOME OF THESE CASES ALL SOFTWARE, HERE IS
14 WHAT HAPPENS IN THE DEPOSITION, THE PRINTED SOURCE, THEY START
15 TO LOOK AT IT. THESE ARE ENGINEERS WHO ARE NOT USED TO LOOKING
16 AT PRINTED SOURCE CODE. THEY WANT TO BE ABLE TO LOOK AT IT AND
17 SEE HOW IT FUNCTIONS NEXT TO THE OTHER FUNCTION. AND VERY
18 OFTEN, IN PAST CASES, YOU GET THE RESPONSE, WELL, IF I COULD
19 LOOK AT THE ELECTRONIC VERSION, I COULD ANSWER YOUR QUESTION,
20 BUT IN THIS FORMAT, IT IS TOO DIFFICULT. SO IT'S A PRACTICAL
21 CONCERN, AND WE DON'T THINK THAT DRIVING AN HOUR UP THE 5 TO
22 GET TO IRVINE IS OF ANY SIGNIFICANT BURDEN ON MITCHELL.

23 THE COURT: ALL RIGHT. I UNDERSTAND THAT. HOWEVER,
24 I DO BELIEVE THAT THE PROTECTIVE ORDER CLEARLY GOVERNS THIS.
25 THESE TWO PARTIES IN THIS LITIGATION HAVE HAD NUMEROUS

1 DISPUTES, AND EVERY ISSUE HAS REALLY BEEN HOTLY CONTESTED. THE
2 PARTIES SPENT A LOT OF TIME COMING UP WITH A PROTECTIVE ORDER,
3 AND THIS COURT IS GOING TO ENFORCE THE PROTECTIVE ORDER.
4 PARAGRAPH 21 OF THE PROTECTIVE ORDER GOVERNS THE PRODUCTION AND
5 USE OF CONFIDENTIAL SOURCE CODE. PARAGRAPH A SPECIFICALLY
6 STATES THAT THE SOURCE CODE WILL BE MADE AVAILABLE AT COUNSEL'S
7 OFFICE, UNDER SPECIFIC SAFEGUARDS. AND THEN PARAGRAPH B SAYS
8 THAT EACH PARTY MAY REQUEST PAPER COPIES OF SOURCE CODE
9 NECESSARY FOR COURT FILINGS, DEPOSITIONS, AND TRIAL.

10 TO ME, THIS PARAGRAPH, THE AGREEMENT BETWEEN THE TWO
11 PARTIES SPECIFICALLY CONTEMPLATED THE ISSUE THAT HAS NOW
12 ARISEN, AND IT RESOLVED IT. AND THAT IS THAT YOU'RE GOING TO
13 USE PAPER COPIES. I UNDERSTAND THAT AUDATEX DOESN'T BELIEVE
14 THAT THAT IS -- THAT IS AS EFFICIENT AND BENEFICIAL AS THEY
15 WOULD LIKE. HOWEVER, YOU ALSO KNEW THAT AT THE BEGINNING OF
16 THE CASE, AS YOU JUST INDICATED IN YOUR ARGUMENT, THIS IS
17 SOMETHING YOU'VE SEEN IN PAST CASES, AS WELL AS IN THIS CASE,
18 THAT ENGINEERS LIKE TO SEE THE ACTUAL SOURCE CODE. FOR
19 WHATEVER REASONS, THE PARTIES REACHED THIS AGREEMENT AND I'M
20 GOING TO ENFORCE THAT. I, THEREFORE, DENY AUDATEX'S MOTION ON
21 THAT ISSUE.

22 ALL RIGHT, THE FINAL THING IS THE MODIFICATION OF THE CASE
23 MANAGEMENT ORDER. I AM NOT GOING TO SET DIFFERENT DATES FOR
24 THE EXPERT REPORTS; HOWEVER, I AM INCLINED TO MOVE THEM BACK
25 SLIGHTLY. I WANT TO BE CLEAR, FACT DISCOVERY CLOSSES TOMORROW.

1 YOU CANNOT DO ANY FACT DISCOVERY AFTER TOMORROW EXCEPT FOR THE
2 DEPOSITIONS THAT WE'VE ALREADY DISCUSSED OR SOMETHING THAT THE
3 TWO SIDES AGREE ON. AND THEN THAT IS OUT OF MY CONTROL. THAT
4 IS A SEPARATE AGREEMENT; OTHERWISE, FACT DISCOVERY CLOSES
5 TOMORROW.

6 BECAUSE THE DEPOSITIONS ARE NOT GOING TO FINISH UNTIL MID
7 FEBRUARY, WHAT I AM INCLINED TO DO IS TO MAKE THE OPENING
8 EXPERT REPORT DEADLINE FEBRUARY 18TH. FOR BOTH PARTIES,
9 REBUTTAL EXPERTS FOR BOTH PARTIES, MARCH 2ND, AND THEN CLOSE OF
10 EXPERT DISCOVERY, MARCH 26TH. THOSE WERE THE DATES PROPOSED BY
11 AUDATEX, FOR AUDATEX. AND I WOULD BE IMPOSING THEM FOR BOTH.
12 IF YOU WANT TO BE HEARD ON THAT ONE, THAT IS ONE I'M GOING TO
13 LET BOTH SIDES BE HEARD ON.

14 MR. MCPHIE: THAT'S ACCEPTABLE, YOUR HONOR, TO
15 AUDATEX.

16 MR. WHITE: THE ONLY SUGGESTION THAT WE WOULD HAVE,
17 YOUR HONOR, IS TO PUSH BACK THE MARCH 2ND DATE A WEEK. THE
18 REASON FOR THAT IS FEBRUARY 18TH IS WHEN WE'RE GOING TO GET TWO
19 REPORTS FROM THE PLAINTIFF, THEIR INFRINGEMENT REPORT AND ALSO
20 THEIR DAMAGES REPORT. AND SO THE BULK OF THE WORK ON THE
21 MARCH 2ND DATE FALLS TO US. AND WE WOULD APPRECIATE AN
22 ADDITIONAL WEEK ON THAT. WE THINK WE CAN GET THE REPORT, THE
23 DEPOSITIONS DONE IN THE WEEKS THAT FOLLOW. WE DON'T THINK WE
24 NEED 24 DAYS FOR THE DEPOSITIONS. WE WOULD APPRECIATE SOME
25 ADDITIONAL TIME TO RESPOND TO THOSE TWO INITIAL REPORTS THAT

1 WE'RE GOING TO BE RESPONDING TO ON THE 2ND AND HAVE ADDITIONAL
2 TIME.

3 THE COURT: HOW MANY EXPERTS ARE THERE?

4 MR. WHITE: SO THERE WILL LIKELY BE -- THERE SHOULD
5 BE THREE REPORTS, FEBRUARY 18TH. THERE SHOULD BE AN INITIAL
6 REPORT FROM AUDATEX ON INFRINGEMENT, AN INITIAL REPORT FROM
7 THEM ON DAMAGES, AND A REPORT FROM US ON VALIDITY.

8 THE COURT: OKAY.

9 MR. WHITE: SO IN ACTUALITY, THEY HAVE ONE RESPONSE,
10 AND WE HAVE TWO AT THAT STAGE.

11 THE COURT: YES, SIR.

12 MR. MCPHIE: OUR CONCERN HAS JUST BEEN THE HISTORY IN
13 THIS CASE HAS NOT SUGGESTED THAT SCHEDULING DEPOSITIONS IS
14 EASY.

15 THE COURT: YEAH.

16 MR. MCPHIE: AND SO PROVIDING FOR A SHORTER TIME
17 PERIOD FOR US TO DO THAT I THINK IS DANGEROUS. AND THE ONLY
18 THING I WOULD SAY IS THERE IS GOING TO BE MAYBE FOUR
19 DEPOSITIONS. I DON'T KNOW HOW MANY EXPERTS THEY HAVE. IT
20 COULD BE --

21 THE COURT: SIX, WOULDN'T IT?

22 MR. MCPHIE: IT WOULD BE SIX AT THE MOST. IT COULD
23 BE THE SAME EXPERT FOR INFRINGEMENT AND VALIDITY, SO AT MOST
24 SIX. AND WE THINK WE HAVE RIGHT NOW THREE WEEKS TO DO THAT.

25 THE COURT: HOW MANY HAVE YOU DESIGNATED?

1 MR. MCPHIE: I BELIEVE WE'VE DESIGNATED THREE.

2 THE COURT: SO YOU ANTICIPATE THREE EXPERTS, AND THEY
3 NEED TO DEPOSE THOSE THREE, ASSUMING THEY DO.

4 MR. MCPHIE: YEAH, TWO OR THREE.

5 THE COURT: TWO OR THREE.

6 MR. WHITE: SAME FOR US, TWO OR THREE.

7 THE COURT: SO IT COULD BE SIX. I'LL GIVE YOU A
8 COUPLE OF EXTRA DAYS. THE REPORTS ARE FEBRUARY 18, SO TWO
9 WEEKS WOULD BE MARCH 4TH. THAT WILL GIVE YOU A LITTLE
10 ADDITIONAL TIME TO DO THAT. BUT I DO THINK WE NEED TO GET THIS
11 DISCOVERY COMPLETED AND GET THIS CASE MOVING.

12 ALL RIGHT. SO IT WILL BE, FACT DISCOVERY CLOSES TOMORROW;
13 OPENING REPORTS, FEBRUARY 18TH; REBUTTAL REPORTS, MARCH 4TH;
14 CLOSE OF EXPERT DISCOVERY, MARCH 26TH. ALL OTHER DATES REMAIN
15 AS SET.

16 I HATE TO EVEN ASK THIS, BUT ANY OTHER ISSUES THAT I HAVE
17 TO ADDRESS TODAY FOR AUDATEX?

18 MR. MCPHIE: YOUR HONOR, JUST ONE THAT WE OUGHT TO
19 ADDRESS FOR FINALIZING THE DEPOSITION SCHEDULE. AND THIS GOES
20 BACK TO THE ISSUE OF INDIVIDUAL VERSUS CORPORATE DEPOSITIONS.
21 THE DATES PROVIDED IN MITCHELL'S OPPOSITION DID PROVIDE DATES
22 FOR TWO 30(B)(6) DATES. ONE 30(B)(6) DATE DIRECTED TO FOUR
23 TOPICS, AND ANOTHER 30(B)(6) DATE RELATING TO ALL THE OTHER
24 TOPICS IN THE 30(B)(6) NOTICE. WE HAVE NOT RECEIVED DATES FOR
25 INDIVIDUAL DEPOSITIONS FOR TWO INDIVIDUALS WHO HAVE BEEN

1 DESIGNATED AS THE 30(B)(6) WITNESSES ON THOSE TWO TOPICS.

2 THE COURT: YOU DIDN'T LIST THEM EITHER, DID YOU? I
3 DIDN'T SEE THAT THERE WERE -- WAS A DISPUTE.

4 MR. MCPHIE: I WAS UNCLEAR. I KNOW YOUR HONOR
5 MENTIONED THAT WE HAD PROVIDED A LIST IN OUR INITIAL BRIEF. I
6 WASN'T CLEAR WHAT THAT WAS.

7 THE COURT: SO MITCHELL'S IS ON PAGE 12 OR THE ECF
8 PAGE 15.

9 MR. WHITE: RIGHT. WE ACTUALLY -- SO WHEN WE SAW
10 THIS CHART, WE ACTUALLY PREPARED OURSELVES FOR PURPOSES OF
11 TODAY OUR --

12 THE COURT: SO I HAVE YOURS ON PAGE 6 OR ECF PAGE 9.
13 THAT IS WHERE I CAME UP WITH THESE TWO.

14 MR. WHITE: SO THAT IS CORRECT, YOUR HONOR. SO THOSE
15 DATES WERE PROVIDED SINCE THE TIME WE FILED. THE QUESTION HAS
16 COME UP RELATED TO THE 30(B)(6) DEPOSITIONS, AS THEY RELATE TO
17 THE PERSONAL DEPOSITIONS.

18 THE COURT: FOR WHOM? WHO ARE THE 30(B)(6)?

19 MR. WHITE: SO FOR JANUARY 30TH, JESSE HERERRA, THAT
20 IS TOMORROW. WE HAVE NOTICED THAT AS A 30(B)(6) DEPOSITION ON
21 THE BULK OF THE TOPICS. AND ON FEBRUARY 6TH, MR. DAY HAS BEEN
22 DESIGNATED ON FOUR FINANCIAL TOPICS. THAT'S HOW THOSE
23 DEPOSITIONS HAVE BEEN NOTICED. THAT'S WHAT WE'RE PLANNING ON
24 GOING FORWARD ON. THE QUESTION THEN IS, AS TO THESE REQUESTED
25 DATES FOR MR. HERERRA AND MR. DAY, TO BE DEPOSED IN PERSONAL

1 ASPECTS.

2 THE COURT: DID YOU NOTICE THOSE DEPOSITIONS?

3 MR. WHITE: YES. THEY HAVE BEEN NOTICED.

4 THE COURT: FOR WHEN?

5 MR. WHITE: THEY WERE ALWAYS DONE SEPARATELY.

6 THE COURT: FOR WHEN? WHEN WERE THEY NOTICED FOR?

7 MR. WHITE: THE ORIGINAL DEPOSITIONS WERE NOTICED

8 BACK IN DECEMBER. WE NOTICED NEW DATES, I BELIEVE, IN

9 FEBRUARY.

10 THE COURT: ALL RIGHT. WHEN ARE THEY --

11 MR. WHITE: THE 12TH AND THE 13TH.

12 MR. MCPHIE: SO WE WOULD PREFER TO HAVE THEM RUN IN
13 CONJUNCTION WITH THE 30(B)(6) TOPICS, SO THERE IS NOT A LOT OF
14 TIME LEFT IN THIS CASE. AND TO HAVE THESE INDIVIDUALS DEPOSED
15 TWICE, WHEN I REALLY DON'T KNOW WHAT THE DIFFERENT TESTIMONY IS
16 GOING TO BE IN THE PERSONAL CAPACITY, VERSUS THE 30(B)(6).

17 THE COURT: OH, I THINK WE JUST SAW THAT BY READING
18 THE DEPOSITION.

19 MR. MCPHIE: I UNDERSTAND. BUT WE AGREED WITH THEIR
20 30(B)(6) WITNESS, TO TAKE THE DEPOSITION SIMULTANEOUS WITH
21 PERSONAL AND 30(B)(6) AT THE SAME TIME.

22 THE COURT: THAT'S WHAT MOST PEOPLE DO. AND I WAS
23 SURPRISED THAT THIS HAS NOT HAPPENED IN THIS CASE.

24 MR. MCPHIE: THAT'S WHAT WE THINK SHOULD HAPPEN. AND
25 GIVEN THE TIME TO FIND ADDITIONAL DAYS FOR THESE TWO WITNESSES,

1 I THINK --

2 THE COURT: CAN YOU DO 30(B)(6) IN THE MORNING, AND
3 THE INDIVIDUAL IN THE AFTERNOON? HOW LONG ARE THESE DEPOS?

4 MR. WHITE: THE 30(B)(6) WILL BE PRETTY EXTENSIVE
5 JUST AS IT WAS FOR THE 30(B)(6) AUDATEX. I HAVE A PROPOSAL
6 THAT MAYBE GETS US HALFWAY.

7 THE COURT: WHAT IS THAT?

8 MR. MCPHIE: FOR MR. DAY, IT IS JUST FOUR TOPICS. I
9 DO THINK THAT FOR MR. DAY, WE CAN COMPLETE HIM IN A SINGLE DAY
10 AND DO IT AT THE SAME TIME. MR. HERERRA PRESENTS MORE OF A
11 DIFFICULTY. HIS DEPOSITION IS SUPPOSED TO GO FORWARD TOMORROW
12 AS A DESIGNEE. HE HASN'T BEEN PREPARED -- OR WE HAVE NOT
13 PREPARED TO TAKE THAT DEPOSITION IN HIS PERSONAL CAPACITY FOR
14 PRECISELY THE REASONS THAT WE HAVE HEARD EARLIER, THAT MITCHELL
15 WANTED TO KEEP THESE THINGS SEPARATE. SO WE WOULD PROPOSE THAT
16 MR. HERERRA GO FORWARD IN A PERSONAL CAPACITY ON FEBRUARY 12TH
17 OR 13TH.

18 THE COURT: IS HE AVAILABLE?

19 MR. MCPHIE: WE DON'T KNOW. WE HAVE TO ASK. BUT I
20 WOULD SUGGEST -- HE'S SENIOR MANAGEMENT IN OUR COMPANY, AND TO
21 HAVE HIM SIT THROUGH TWO FULL DAYS OF DEPOSITION, WE DON'T
22 THINK IS APPROPRIATE.

23 THE COURT: THEY HAVE THE RIGHT TO DO THAT. THEY
24 HAVE THE RIGHT TO HAVE A PERSONAL DEPOSITION AND A -- YOU KNOW,
25 YOU CHOSE HIM AS THE 30(B)(6) FOR THESE TOPICS.

1 MR. WHITE: WELL, THEN I WOULD LIKE THE PERSONAL
2 DEPOSITION AND THE 30(B)(6) -- I'LL TRY AND COMPLETE IT ALL IN
3 ONE DAY. WE STOPPED AT SEVEN HOURS, AND WE'D LIKE SOME
4 ADDITIONAL TIME WITH THAT WITNESS. IF WE'RE NOT GOING TO AGREE
5 TO DO SIMULTANEOUSLY FOR EFFICIENCY, WE'D LIKE TO TAKE THE
6 DEPOSITION IN A PERSONAL CAPACITY AS WELL.

7 THE COURT: HAVEN'T YOU ALREADY TAKEN THAT? THAT IS
8 WHAT I JUST --

9 MR. WHITE: WE DID, AND SO THE POINT WAS, IS WE -- I
10 AGREED TO DO THEM SIMULTANEOUSLY. WE'D ASKED IN ADVANCE FOR
11 ADDITIONAL TIME. GIVEN THAT SHE'S THE DESIGNEE FOR 40-PLUS
12 TOPICS, AND WE WERE GOING TO RUN PERSONAL SIMULTANEOUS WITH
13 THAT, WE'RE TRYING TO DO IT EFFICIENTLY. SO IF THEY AGREE TO
14 GO SIMULTANEOUS. BUT WE OBVIOUSLY DID NOT HAVE ENOUGH TIME TO
15 GET TO ALL THE ISSUES, SO WE WOULD REQUEST THAT WE HAVE
16 ADDITIONAL TIME WITH HER AS WELL.

17 MR. MCPHIE: YOUR HONOR, THAT WAS MITCHELL'S CHOICE.
18 WE MADE IT VERY CLEAR, WE SAID, LOOK, IF YOU WANT THE
19 CONVENIENCE TO DO PERSONAL TOPICS AND THE CORPORATE TOPICS IN
20 THE SINGLE DEPOSITION, YOU'RE WELCOME TO DO THAT IN ONE DAY.
21 THAT IS YOUR CHOICE. BUT UNDERSTAND THAT WE'RE NOT GOING TO
22 GIVE YOU ADDITIONAL TIME UNDER 30(B)(6) TOPICS. WE'RE NOT
23 GOING TO RAISE OBJECTIONS DURING THE DEPOSITION. YOU CAN ASK
24 PERSONAL TOPICS, CORPORATE TOPICS. WE MADE THAT VERY CLEAR IN
25 ADVANCE.

1 THE COURT: YEAH, I'M GOING TO -- I'M NOT GOING TO
2 REOPEN THAT DEPOSITION. I WILL SAY, I FIND IT VERY
3 DISAPPOINTING THAT THIS IS HOW COUNSEL IS CHOOSING TO PROCEED
4 FORWARD ON THESE. BUT I DO BELIEVE THAT THE LAW REQUIRES --
5 ALLOWS THEM TO DO THIS.

6 SO I'M GOING TO REQUIRE MR. DAY'S DEPOSITION, BOTH THE
7 30(B)(6) AND THE INDIVIDUAL, TO OCCUR WITHIN THE SEVEN HOURS ON
8 FEBRUARY 6TH. THEY CAN BE IN THE -- YOU CAN DO 30(B)(6) IN THE
9 MORNING, INDIVIDUAL IN THE AFTERNOON, OR YOU CAN DO ONE DAY
10 WITH BOTH TOPICS. I DON'T CARE HOW YOU DO IT. BUT IT'S GOING
11 TO HAPPEN ON FEBRUARY 6 IN SEVEN HOURS.

12 ON MR. HERERRA, I'M GOING TO ALLOW YOU A SECOND DAY.
13 BECAUSE IF HE'S PREPARED AND READY TO GO ON THE 30TH, IT MAY
14 MAKE SENSE IF HE'S AVAILABLE, TO THEN DEPOSE HIM ON THE 2ND OR
15 3RD OF FEBRUARY, DEPENDING ON HIS AVAILABILITY. I'M NOT GOING
16 TO REQUIRE IT TO BE AT THE END. WE'RE GOING TO DO IT BASED ON
17 HIS AVAILABILITY. WE NEED TO GET THESE DEPOSITIONS DONE.

18 MR. MCPHIE: CAN WE HAVE SOME SORT OF LIMIT ON THAT?
19 I MEAN, I JUST THINK THAT IS -- WHAT IS FAIR IS FAIR, RIGHT. I
20 MEAN, IT DOESN'T SEEM RIGHT TO IMPOSE THE LIMIT ON US, WHEN
21 WE'RE TRYING TO DO THINGS EFFICIENTLY, AND THEN HAVE THEM HAVE
22 TWO FULL DAYS WITH A VERY SENIOR PERSON.

23 THE COURT: DID YOU REACH ANY SORT OF AGREEMENT WITH
24 THEM? THAT'S THE PROBLEM I HAVE.

25 MR. MCPHIE: WE DID IN ADVANCE. WE REQUESTED

1 ADDITIONAL TIME, AND THEN THEY SAID -- THE RESPONSE WAS, WE
2 DEFINITELY SIGNED THIS ISSUE UPFRONT.

3 MR. WHITE: AND WHICH WE DID THINGS EFFICIENTLY.

4 THE COURT: WELL, ON BOTH SIDES, THIS HAS NOT BEEN
5 EFFICIENT. I'M JUST RULING ON A MOTION FOR THE THIRD TIME WITH
6 YOU GUYS. SO I'M NOT PERSUADED BY THIS EFFICIENCY ARGUMENT.
7 WE'RE JUST AT THE END OF DISCOVERY.

8 HOW LONG DO YOU NEED TO DEPOSE HIM? IT DOESN'T SEEM IT
9 SHOULD TAKE 14 HOURS.

10 MR. WHITE: I DON'T THINK SO, YOUR HONOR. I MEAN, IF
11 WE HAVE HALF DAYS AND --

12 THE COURT: SOME TIME ON THE INDIVIDUAL?

13 MR. WHITE: ON THE INDIVIDUAL, YES.

14 THE COURT: SO LET'S DO THAT. THE 30(B)(6) WILL BE
15 SEVERAL HOURS. THE INDIVIDUAL WILL BE THREE HOURS. AND IF YOU
16 CAN DO IT ON FEBRUARY 2ND OR 3RD, THAT WOULD BE -- IF HE CAN DO
17 IT --

18 MR. MCPHIE: YOUR HONOR, I'M GOING TO HAVE TO CHECK.

19 THE COURT: THAT WOULD BE IDEAL FOR HIM, I WOULD
20 THINK, PREPARE ONCE, GET IT OVER WITH.

21 MR. MCPHIE: THE SCHEDULING HERE, WE'LL HAVE TO GET
22 BACK AND SEE WHAT THAT IS IN TERMS OF AVAILABILITY.

23 THE COURT: TALK TO EACH OTHER. CALL THESE PEOPLE.
24 GET THIS WORKED OUT. GET THIS CASE, GET THE DISCOVERY DONE,
25 AND WE'LL MOVE ON. ALL RIGHT.

1 MR. MCPHIE: THE ONLY OTHER ISSUE WE DIDN'T TALK
2 ABOUT IS MR. YORKS' DEPOSITION, THE PROSECUTING ATTORNEY. THE
3 FIRST ISSUE YOU TOOK UP TODAY WAS ORDERING THAT DEPOSITION.

4 THE COURT: RIGHT.

5 MR. MCPHIE: WE NEED TO GET THAT DONE, I ASSUME, IN
6 THE SAME TIME FRAME?

7 THE COURT: YES, SAME THING. THAT DEPOSITION HAS TO
8 OCCUR BY -- WHAT DATE DID I USE?

9 MR. MCPHIE: THE 16TH.

10 THE COURT: IT HAS TO BE DONE BY THE 16TH.

11 MR. WHITE: THAT WILL BE VERY SIMPLE, YOUR HONOR.
12 GIVEN HOW LIMITED IT IS, WE SHOULD BE ABLE TO TAKE CARE OF
13 THAT.

14 THE COURT: PERFECT. THANK YOU, COUNSEL.

15 MR. WHITE: THANK YOU, YOUR HONOR.

16 MR. MCPHIE: THANK YOU, YOUR HONOR.

17 (RECESS AT 11:21 A.M.)

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1 C-E-R-T-I-F-I-C-A-T-I-O-N

2 I HEREBY CERTIFY THAT I AM A DULY APPOINTED,
3 QUALIFIED AND ACTING OFFICIAL COURT REPORTER FOR THE UNITED
4 STATES DISTRICT COURT; THAT THE FOREGOING IS A TRUE AND CORRECT
5 TRANSCRIPT OF THE PROCEEDINGS HAD IN THE AFOREMENTIONED CAUSE;
6 THAT SAID TRANSCRIPT IS A TRUE AND CORRECT TRANSCRIPTION OF MY
7 STENOGRAPHIC NOTES; AND THAT THE FORMAT USED HEREIN COMPLIES
8 WITH THE RULES AND REQUIREMENTS OF THE UNITED STATES JUDICIAL
9 CONFERENCE.

10 DATED: FEBRUARY 2, 2015, AT SAN DIEGO, CALIFORNIA

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S/DEBORAH M. O'CONNELL, CSR #10563
REGISTERED PROFESSIONAL REPORTER

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